APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed October 23, 2001]

No. 99-16674

D.C. No.
CV-98-00775-ACK

NICANOR E. CASUMPANG, JR.,
Plaintiff-Appellant,

v.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, LOCAL 142
Defendant,

and

JOHN DOES 1-10; INTERNATIONAL LONGSHORE &
WAREHOUSE UNION, LOCAL 142; EUSEBIO LAPENIA, JR.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued February 15, 2001
Submission deferred February 15, 2001
Submitted March 9, 2001
San Francisco, California

OPINION

Before: Arthur L. Alarcon, Alex Kozinski, and Michael Daly Hawkins, *Circuit Judges*.

ALARCON, *Circuit Judge*:

Nicanor E. Casumpang, Jr. appeals from the dismissal of this action. The district court concluded that it lacked subject matter jurisdiction pursuant to Title IV of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 481-83 (2000), over his second amended complaint and, alternatively, on the basis that "[e]ven if the Court found that Plaintiff's Second Amended Complaint substantively involved Title I rights rather than Title IV rights, which it does not, the Court would still dismiss the complaint because Plaintiff failed to exhaust internal union procedures in a timely fashion."

We reverse the dismissal of this action because we conclude that the district court erred in determining that it lacked subject matter jurisdiction over the second amended complaint. We also vacate the dismissal of the second amended complaint because the district court erroneously determined that Casumpang was required to exhaust union hearing procedures before filing his Title I claim in the district court.

PART ONE

I

The Cease-and-Desist Outside Gainful Employment Order

Casumpang has been a member of the International Longshore and Warehouse Union ("ILWU") since July 22, 1981. On April 2, 1996, Casumpang was employed full-time as an elected business agent of Local 142 of the ILWU. Members of the Local Executive Board filed written charges against him on that date, alleging he had violated Article II, § 1 of the

Local's constitution.[1] The matter was set for trial on April 16, 1996 before the Maui Division Trial Committee. Before then, Casumpang, officers of the Local, and Roger Tacdol, the ILWU Maui Division Director, entered into a stipulation concerning the facts and waived their right to a trial.

The parties stipulated as follows: Casumpang was an elected full-time official on the Local's payroll. While an employee, Casumpang had performed services as a licensed electrical contractor without authorization of the Executive Committee or approval of the Local Executive Board. Casumpang also agreed not to seek an appeal from the determination of the Maui Division Trial Committee, or file any action against the Local or its agents or officers because of the charges brought against him.

Based on the stipulated facts, the Maui Division Trial Committee found Casumpang guilty of violating Article II, § 1 of the Local's constitution. Casumpang was ordered to cease working as an electrical contractor and to seek prior authorization before engaging in any further business as an electrical contractor. On April 22, 1996, Casumpang applied to the Local Executive Board for authorization to conduct an electrical contracting business. His request was denied on June 4, 1996.

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[1] At the time, Article II, § 1 of the Local's constitution read in relevant part: "Elected . . . full-time officials of the Local, while on the Local payroll, shall not be permitted to hold any other gainful position unless authorized by the Executive Committee with the approval of the Local Executive Board."

II

A. *The Challenged November 1997 Ballot Count*

The Local elects officers every three years as required by § 401(b) of the LMRDA, 29 U.S.C. § 481(b).[2] Casumpang was nominated for the position of Maui Division Director on September 8, 1997. His opponent was Rogelio "Roger" Tacdol. Casumpang won the election with 2017 votes, to Tacdol's 1999. Tacdol appealed the results, listing four irregularities in the counting of challenged ballots. The Local appointed an Election Investigating Committee to examine these challenges.

Tacdol submitted a supplemental challenge to the election results about a week later. In addition to the four grounds he previously asserted, Tacdol alleged that Casumpang violated the Local Election Code by campaigning while on duty as a business agent, and placing campaign literature on the windshields of cars in the employees' parking lots at three hotels in Maui.

The Election Investigating Committee found that the Maui Division Balloting Committee had "improperly opened, counted and commingled 115 challenged ballots." It also found that Casumpang had campaigned on "paid time," and that fliers advertising Casumpang's candidacy were left on cars on hotel property. The Election Investigating Committee recommended that the election results be set aside and that the Local Executive Board direct that a new election be conducted.

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[2] LMRDA § 401(b) reads as follows:

> Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

The Local Executive Board sustained Tacdol's challenge to the election based on the findings of the Election Investigating Committee, and ordered a new election within forty-five days.

On January 16, 1998, Casumpang filed an appeal with Brian McWilliams, President of the ILWU, from the Local Executive Board's decision. Casumpang alleged that Tacdol had "handpicked" a majority of the members of the Maui Division Balloting Committee including a relative, Frances Pagay, and others who had campaigned for his election. Casumpang argued that the evidence presented to the Election Investigating Committee was insufficient to demonstrate that the procedures followed in counting the ballots affected the outcome of the election. Casumpang asserted that "the Election Investigating Committee's hearing was 'fixed,' and a complaint has been filed with the U.S. Department of Labor." Finally, Casumpang maintained in his January 16, 1998 appeal that a re-election should not have been ordered because his margin of victory would have been greater but for serious violations of the Local's election procedures by the Balloting Committee.

B. *The Loss of Good Standing Membership Privileges*

Within a week of the Executive Board's ordering a new election, the officers of the Local requested that Casumpang provide information regarding whether he had continued to work as an electrical contractor after his request for authorization to do so was denied.

Casumpang objected to the timing and fairness of the investigation and accused the officers of the Local of "an attempt to selectively prosecute me as a result of my election to the office of Division Director." Casumpang denied that he had been gainfully employed as an electrical contractor since June 4, 1996.

The Secretary-Treasurer of the Local notified Casumpang in writing that "you may not be eligible for the union office to which you have been nominated" because a doubt had been raised regarding whether Casumpang had been gainfully employed in violation of Article II, § 2.01 of the Local's constitution, as amended in 1997. Two days later, thirteen members of the Local filed written charges accusing Casumpang of performing work as an electrical contractor. He was also charged with filing electrical permit applications with the Department of Public Works, County of Maui, a violation of the Maui Trial Division's order.

Casumpang filed a written response to the charges before his hearing. He contended, among other things, that he had not been properly served with notice of his possible ineligibility for office until the last day for the filing of a response. He complained that "[t]his intentional and unprofessional tactic is but another in a long string of attempts to prevent me from assuming the post [to] which I have been duly elected by the membership of the Maui Division of the ILWU." Casumpang argued that Article II of the Local's constitution was invalid because it had not been properly ratified by the Local's membership. He also said that he had not been gainfully employed as an electrical contractor since June 4, 1996. He admitted that he had filed for electrical permits as favors to friends, without receiving compensation.

The Judicial Panel conducted a hearing on January 16, 1998 to consider evidence concerning charges filed on January 7, 1998. On January 17, 1998, the Judicial Panel rendered its decision. It found that Casumpang had "knowingly and deliberately violated Article II, Section 1 of the [Local's] Constitution on or about June 14, 1996, July 16, 1996, August 20, 1996, October 22, 1996, June 2, 1997, July 30, 1997, August 6, 1997, October 13, 1997, and October 27, 1997."

The Judicial Panel ordered as follows:

> 1. Effective June 14, 1996[,] Casumpang is suspended as a member in good standing of ILWU Local 142 for a period of nine (9) consecutive years.
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> 2. During the period of his suspension as a member in good standing of ILWU Local 142 (a period of 9 years) Casumpang shall neither be eligible for nomination [to], nor serve as[,] an officer of ILWU Local 142 or as an officer or steward of any of the units of ILWU Local 142.
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> 3. Effective January 7, 1998, Casumpang shall receive no further compensation as a business agent and Casumpang is hereby ordered to turn in all union office keys and all papers and property of the union on January 19, 1998 at 12:00 noon to the Secretary [-] Treasurer of the union, or his designee.
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> 4. Effective the date of this Decision and Order and continuing up to June 14, 2005[,] Casumpang shall not be permitted to serve in any appointed full-time position in ILWU Local 142.
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> 5. Within 60 days of the date of this Decision and Order Casumpang shall pay a fine of $7,636 to ILWU Local 142.

The Judicial Panel notified Casumpang that he had a right to appeal from its decision to the Local Executive Board within fifteen days. Casumpang was also informed that Rule 27 of the Financial Code of ILWU Local 142 required him to exhaust internal union remedies before seeking recourse outside the union.

Casumpang appealed this decision before the Local Executive Board. He argued that the Judicial Panel had not been properly constituted and had no jurisdiction because the proposed amendments to the Local's constitution had not been

ratified by the union membership. He argued that Article II, § 1 of the Local's constitution was ambiguous and ill-defined and had been misconstrued and misapplied by the Judicial Panel. Casumpang also maintained that he had been deprived of a full and fair hearing before the Judicial Panel.

The Local Executive Board rejected Casumpang's appeal. The Local Executive Board determined that the Judicial Panel had been properly constituted and that there was clear and convincing evidence that Casumpang had violated the cease-and-desist order. It also concluded that the "punishment" meted out by the Judicial Panel was fair and reasonable.

Casumpang filed an appeal from the Local Executive Board with McWilliams. Casumpang requested that the decision of the Judicial Panel be declared void because it violated the Local's constitution and bylaws. He also argued that the penalty he had received was arbitrary and capricious. Casumpang said that he had performed outside electrical work with the permission of the Local's president, Eusebio Lapenia, Jr. He claimed that the Local leadership had concealed this information from the Judicial Panel.

McWilliams dismissed Casumpang's appeal on procedural grounds. Specifically, McWilliams stated that Casumpang had failed to appeal the decisions of the Judicial Panel and the Local Executive Board to the Local's membership pursuant to § 27.10.5 of the Local's constitution.[3] In a

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[3] Section 27.10.5 of the Local's constitution (1997) provides:

> After the decision [of the Judicial Panel] is reached and recorded, the accused shall be called in and informed of the decision by the Chair of the Judicial Panel. If the accused is found guilty, the Chair of the Judicial Panel shall advise them [sic] of their rights of appeals [sic] to the Local Executive Board[,] to the Local membership[,] and to the International Union.
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> In an appeal to the Local membership, the accused shall have the right to appear at each unit membership meeting for the purpose of

footnote, McWilliams stated: "A decision on the merits of Brother Casumpang's appeal would have resulted in it[s] being denied as he failed to prove that there were procedural errors in the manner in which Local 142 handled the complaint against him."

On August 14, 1998, Casumpang wrote McWilliams notifying him that he was appealing the July 1, 1998 dismissal of his April 18, 1998 appeal to the International Executive Board on two grounds. Casumpang argued that the question whether he was required to appeal to the local membership had not been raised by the Local in response to his previous appeals to the ILWU. He also argued that his appeal complied with the amended text of Article XXVII of the Local's constitution. As amended, it read:

> Any accused wishing to appeal the action of the Judicial Panel must do so in writing within fifteen (15) days after being notified by the Chair of the Judicial Panel. The appeal must be in writing and shall be made to the Local Executive Board. The decision of the Local Executive Board shall be final. In all cases, however, the decision of the lower tribunal must be complied with before the right to appeal can be accepted by the next tribunal in authority and shall remain in effect until reversed or modified. All appeals must be exhausted before resorting to [the] courts.

Local 142 Constitution § 27.13 (1997).

Casumpang wrote to the President of Local 142 on August 25, 1998, requesting permission to appeal to the local union's membership. His request was rejected for failure to exhaust internal union remedies. One week later, McWilliams informed Casumpang that his appeal to the International

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pleading their case. The membership of each unit shall vote thereon, and the majority of the total membership's votes shall determine the result.

Executive Board was rejected as untimely pursuant to Article IX, § 5 of the ILWU Constitution because it had been filed more than thirty days after McWilliams's decision.

In a letter signed by the Local's president, Casumpang's appeal to the Local membership was denied for failure to exhaust internal union remedies. The letter states that "[i]n election matters of this nature, the [S]ecretary of [L]abor has exclusive jurisdiction, provided a timely appeal has been filed under 29 U.S.C. [§] 482(a)."

C. *The Re-run Election*

One day after the Local Executive Board had ordered a new election for the position of Maui Division Director, the Local's Secretary-Treasurer notified Casumpang in writing that he was ineligible to serve as a candidate for union office because he had not been a member in good standing for a period of two consecutive years prior to nomination. He was also informed that his name would not appear on the ballot in the upcoming re-election for Maui Division Director. The notice closed with the following admonition: "If you disgree with this determination, please be aware of the requirements of exhaustion of internal union remedies under Rule []27 of the Financial Code."

In January 1998, the Local held a re-run election. Tacdol was elected unopposed for the office of Division Director. The election results were announced on February 10, 1998.

In a letter dated March 10, 1998, McWilliams denied Casumpang's January 16, 1998 appeal challenging the decisions of the Election Investigating Committee and the Local Executive Board which set aside the results of the earlier election. McWilliams found that the Local followed its constitution, bylaws, and rules in addressing the challenges to the November 1997 election. He noted that under the

ILWU's Constitution he could not rehear the evidence or substitute his judgment in place of that of the Election Investigating Committee.

Casumpang filed a complaint with the Department of Labor on October 9, 1998, alleging that violations of the LMRDA had occurred in the election of officers in the November 26, 1997 election, and in the rerun of that election conducted on January 30, 1998. On April 11, 1999, Lary F. Yud, the Chief of the Division of Enforcement of the Department of Labor, informed McWilliams that the Department of Labor had determined that "legal action is not warranted in this case." The Statement of Reasons accompanying the letter from Yud concludes: "[T]he complainant did not file a complaint with the Department of Labor within one calendar month of either exhausting available internal union remedies or within one calendar month of invoking available internal remedies without obtaining a final decision within three calendar months."

PART TWO

I

The Title I Freedom of Speech Claim

On September 23, 1998, Casumpang filed this action in the district court pursuant to § 102 of the LMRDA, 29 U.S.C. § 412,[4] against Local 142, its president, Eusebio Lapenia, Jr., and ten John Does (collectively, the "Local"). He alleged in

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[4] LMRDA § 412 reads:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

his complaint that the Local removed him "from his elected position as Business Agent and suspended his membership . . . in retaliation for his exercise of his free-speech activity" contrary to the protection guaranteed to union members by Title I of the LMRDA §§ 101(a)(1), (2), 29 U.S.C. §§ 411(a)(1), (2).[5]

Casumpang requested the following relief from the court:

> 1. Issue a declaratory judgment that Defendants' conduct complained herein violated Section 101(a)(1) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. [§] 411(a)(1).
>
> 2. Order Defendants to make Plaintiff whole by reinstating him to his former position with Local 142, providing the appropriate back pay and reimbursement

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[5] LMRDA §§ 101(a)(1), (2) provide:

> (a)(1) Equal rights
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> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
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> (2) Freedom of speech and assembly
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> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

for lost pension and other benefits and expenses in an amount to be shown at trial; or in the alternative, order Defendants and each of them jointly and severally, to pay Plaintiff the present value of his future lost earnings in an amount to be shown at trial.

3. Order Defendants to make Plaintiff whole by reinstating him as a member of Local 142 with all privileges accompanying such membership.

Casumpang also prayed for compensatory damages of not less than $100,000 and punitive damages or exemplary damages, plus attorney's fees and costs.

On October 19, 1998, Casumpang filed his first amended complaint. It is identical to the original complaint except that the surname of the president of Local 142 (Eusebio Lapenia, Jr.) is spelled correctly. Casumpang filed his second amended complaint on June 4, 1999. Casumpang alleged that he was "deprived of his membership with Local 142[ ] with all the privileges that accompanied such membership" as a direct and proximate result of the Local's retaliation "for Plaintiff's exercise of his free-speech activity as a union member under 29 U.S.C. [§] 411."

In the second amended complaint, Casumpang alleged specific facts to support his claim that his status as a member in good standing was taken away in retaliation for his criticism of the leadership of Local 142. Casumpang first alleged that in 1995 he expressed his disagreement with the leaders of Local 142 regarding their resolution of a dispute with Monarch Building Supply in Maui. After approximately four months of informational picketing by union members, Casumpang learned that Monarch Building Supply had offered to settle the matter for $50,000. Local leaders instructed Casumpang to accept $13,500. Casumpang questioned the leadership of Local 142 about the remaining amount. He refused to accept the lesser amount

without consulting the pickets. The leadership of the Local, however, accepted the $13,500 offer without consulting the union members.

Second, Casumpang alleged that in that same year, he advised Lapenia during the course of negotiating several master agreements with hotels, including five hotels in Maui, that the hotels were willing to offer a two percent wage increase each year for three years if their master agreement was extended. The leaders of the Local refused the offer. As a result, the master agreement was not renewed. The hotels stopped collecting union dues, and the employees of these hotels were without a collective bargaining agreement for eighteen to twenty-four months. Casumpang alleges he criticized the decision of the Local leadership not to accept the hotels' offer, and criticized the use of attorneys in the negotiations with the hotels. Previously, attorneys had not participated in contract negotiations. Further, Casumpang expressed his objection to the memorandum of agreement Lapenia negotiated with the Kaanapali Beach Hotel because it resulted in a decrease in the employer's contribution to the members' pension plan, the loss of meal benefits, and the failure to include the payment of a wage increase deferred in 1994.

Finally, Casumpang alleged that, at a meeting attended by Lapenia, he objected to Lapenia's withholding of approximately $500,000 of union members' deferred wage increases for the establishment of a health and welfare fund. When union members learned of Lapenia's withholding of funds, they threatened to sue the Local and its officers. As a result of these threats, the Local abandoned the plan for the creation of the health and welfare fund. Casumpang alleged that he reiterated his criticisms of Local leaders at the Local 142 convention in September, 1997. Approximately three months after the 1997 convention, the Local requested that Casumpang supply information regarding his electrical contracting business.

In the second amended complaint, Casumpang deleted the allegation present in his first two complaints that "Defendants had removed him from his elected position as Business Agent." Instead, the second amended complaint merely asserts that "Plaintiff has been deprived of his membership with Local 142, with all the privileges that accompanied such membership." In his prayer for relief, Casumpang also omitted his previous request that the court order "Defendants to make Plaintiff whole by reinstating him to his former position with Local 142" with back pay and reimbursement for lost pension and other benefits. Instead, the prayer in the second amended complaint reads as follows:

> Wherefore, Plaintiff respectfully prays that this Court:
>
> 1. Issue a declaratory judgment that Defendants' conduct complained herein violated Section 101(a)(1) and (2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Sec. 411(a)(1) and (2).
>
> 2. Order Defendants to make Plaintiff whole by reinstating him as a member of Local 142 with all the privileges accompanying such membership.
>
> 3. Enter judgment in favor of Plaintiff and against Defendants, jointly and severally, for compensatory damages, in an amount to be determined at trial, not less than $100,000.
>
> 4. Enter judgment in favor of Plaintiff and against Defendants, jointly and severally, for punitive or exemplary damages, to be determined at trial.
>
> 5. Grant Plaintiff reasonable attorney's fees and costs.
>
> 6. Grant such other and additional relief as may this Court seem proper [sic].

II

The Dismissal Proceedings

A. *The Local's Motion to Dismiss*

The Local filed a motion to dismiss Casumpang's complaint before he filed his second amended complaint. The Local asserted that the district court lacked subject matter jurisdiction. Specifically, the Local argued that a "post election challenge of this nature relating to the eligibility of a candidate is a claim arising under Title IV of the LMRDA which falls within the exclusive jurisdiction of the Secretary of Labor under 29 U.S.C. § 482, § 483."

On May 26, 1999, Casumpang filed a memorandum opposing the motion. Casumpang asserted that his purpose in filing the second amended complaint was to eliminate any claims under Title IV.[6] He argued that he was "not seeking

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[6] "[T]he purpose of Title IV of the LMRDA is to provide free and democratic elections" while giving effect to the "countervailing policy . . . that unions should be free to conduct their affairs so far as possible and the government should not become excessively involved in union politics." *Reich v. Local 89, Laborers' Int'l Union*, 36 F.3d 1470, 1476 (9th Cir. 1994). Under Title IV:

> In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) . . . .

LMRDA § 401(e), 29 U.S.C. § 481(e).

A member of a labor organization—

> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body . . . may file a complaint with the Secretary [of Labor] within one calendar month thereafter alleging the violation of any provision of section 481 of this title . . . .

LMRDA § 402(a)(1), 29 U.S.C. § 482(a)(1).

reinstatement . . . as an elected official, but only as a union member." He further maintained that he did not "attempt to reverse any elections" in the relief requested in the second amended complaint. Casumpang asserted that his cause of action for restoration of his membership right to vote and participate in union decisions was protected under Title I.[7]

The Local filed a reply brief, contending that the second amended complaint sought an order restoring Casumpang to the status of a "member in good standing." It argued that "Casumpang's suspension as a 'member in good standing' affects only his right to serve in union office." Thus, the Local maintained, Casumpang's federal action "is in reality a challenge to the results of the February 10, 1998 election for the five business agent positions on Maui won by Bazarin, DeMello, Franco, Kennison, and Viernes." The Local asserted that "[s]uch a claim is cognizable only through a post election challenge of the 1998 Maui business agent contest"

> The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election . . . .

LMRDA § 402(b), 29 U.S.C. § 482(b).

> The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

LMRDA § 403, 29 U.S.C. § 483.

[7] "Title I is designed to guarantee every union member equal rights to vote and otherwise participate in union decisions, freedom from unreasonable restrictions on speech and assembly, and protection from improper discipline." *Local No. 82, Furniture & Piano Moving, Furniture Store Drivers v. Crowley*, 467 U.S. 526, 536-37 (1984); LMRDA §§ 101(a)(1), (2), 29 U.S.C. §§ 411(a)(1), (2). "Section 102 creates a federal cause of action for infringement of the rights provided in § 101. LMRDA[ ] § 102, 29 U.S.C. § 412." *Murray v. Laborers Union Local 324*, 55 F.3d 1445, 1453 n.9 (9th Cir. 1995).

under Title IV. The Local renewed its request that the court dismiss Casumpang's complaint for lack of jurisdiction over a Title IV action challenging an election already conducted.

B. *The Court Proceedings on the Motion to Dismiss*

The district court heard arguments from counsel on the Local's motion to dismiss on June 16, 1999. No oral testimony was presented.

The Local argued that dismissal of this action was required because Casumpang had failed to demonstrate the existence of a factual and legal basis to support subject matter jurisdiction over his claim. Their contentions can be summarized as follows:

1. Engaging in work as an electrical contractor is not a protected activity.

2. Casumpang failed to allege facts to support a claim under Title I because he failed to challenge the Local's determination that while serving as a business agent, he had also been gainfully employed as an electrical contractor in violation of Article II, § 1 of the Local's constitution.

3. The civil rights protections set forth in Title I solely apply to union members. They do not apply to business agents.

4. A challenge to the deprivation of a union member's good standing status can only be asserted under Title IV. Thus, Casumpang "cannot bring a Title I case to have a court determine that [he is] a member in good standing."

5. Casumpang's prayer for $100,000 in compensatory damages demonstrates that he is contesting the results of the February 10, 1998 rerun election for the office of Business Agent.

Casumpang made the following points in response to the motion to dismiss:

> 1. The second amended complaint "excised all allegations relating to a[n] election and added allegations that were specific as to Mr. Casumpang's . . . exercise of his First Amendment rights."
>
> 2. "[T]he second amended complaint does not seek to undo the election."
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> 3. The second amended complaint does not request back pay for Casumpang's work as business agent or as Maui Division Director.
>
> 4. The suspension of his good standing status deprived Casumpang of his right to participate in the union's meetings and vote in elections.
>
> 5. The suspension of Casumpang's good member status for his employment as an electrical contractor was pretextual. He was disciplined in retaliation for expressing his views on behalf of his fellow union members.
>
> 6. The prayer for relief does not ask the court to invalidate the 1998 election "because we feel that that is totally within the purview of the Secretary of Labor under Title IV."
>
> 7. In its motion to dismiss, the Local did not dispute the facts set forth in the second amended complaint regarding Casumpang's critical comments about the Local leadership's improper conduct.

C. *The Judgment*

The district court granted the Local's motion to dismiss this action for lack of subject matter jurisdiction. The court reasoned as follows:

> [A]lthough Plaintiff no longer wishes to overturn the results of the [1998] rerun election, a course that would

> certainly run afoul of Title IV, the court finds that the substance of Plaintiff's complaint still involves Title IV because it revolves around overturning the union's decision to suspend him as a member in good standing and effectively means reinstating his eligibility to hold union office. This relief—having the Court reinstate him as a member in good standing—would implicitly impact the 1998 rerun election results because it would be akin to having the Court declare that Plaintiff was improperly barred from running in that election, which determination is the exclusive province of the Secretary of Labor. *See* 29 U.S.C. § 483.

The district court also made the following observation:

> Even if the Court found that Plaintiff's Second Amended Complaint substantively involved Title I rights rather than Title IV rights, *which it does not*, the Court would still dismiss the complaint because Plaintiff failed to exhaust internal union procedures in a timely fashion. Plaintiff correctly points out that determining whether a union member must first exhaust internal remedies is a matter of judicial discretion.

(emphasis added). In rejecting Casumpang's assertion that the pursuit of internal remedies would be futile, the district court stated: "The Court disagrees with Plaintiff's argument and finds that, in the exercise of judicial discretion, the failure to utilize available internal remedies to protest the alleged violations of Title I is an alternative reason justifying dismissal."

Finally, the district court said that "[e]ven if the Court construed Plaintiff's Title IV appeal to the Secretary of Labor as also involving Title I, the Secretary of Labor's determineation that Plaintiff failed to exhaust internal union remedies in a timely fashion with regard to Plaintiff's Title IV claims would also apply to Plaintiff's Title I claims." In footnote 10

of its order, the district court noted that "[i]n its Statement of Reasons, the Department of Labor expressly stated that *it did not consider the issue of whether Plaintiff's rights under Title I were violated by the suspension.*" (emphasis added).

PART THREE

Discussion

I

The district court concluded that it lacked subject matter jurisdiction because the thrust of Casumpang's complaint fell under Title IV rather than Title I of the LMRDA. The court also concluded that it lacked jurisdiction because Casumpang's complaint did not arise under Title I. We review *de novo* a district court's dismissal for lack of subject matter jurisdiction. *Seven Resorts, Inc. v. Cantlen*, 57 F.3d 771, 772 (9th Cir. 1995). Any factual determinations made by the district court in ruling on a motion to dismiss are reviewed for clear error. *Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994).

Casumpang first contends that the district court erred in concluding that it lacked subject matter jurisdiction because Title IV governed his complaint. Casumpang maintains that his claim arose under Title I and that the district court therefore possessed subject matter jurisdiction. The Local counters that Casumpang lacks standing to bring a claim under Title I. The Local also contends that Casumpang's claim does not arise under Title I because he has failed to demonstrate a causal connection between his criticism of the Local leadership and the suspension of his membership in good standing. Finally, the Local argues that Casumpang presented insufficient evidence to rebut the affidavits it offered in support of its contention that Casumpang was stripped of his membership for violating Article II, § 1 of the Local's constitution. We address each of these arguments below.

A. *Standing*

We first address the question of standing because it "is part of the common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). The Local contends that Casumpang lacks standing to prosecute a claim under Title I because his criticisms of the actions of Local leaders "arose in connection with Casumpang's role as a business agent, and not as a union member." No citation was set forth in the Local's brief to support this contention. We assume the Local is relying on the principle that a plaintiff's interest must be "arguably within the zone of interests to be protected" by a federal statute in order to satisfy the prudential component of standing. *Associated Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

Guy Fujimura, the Secretary-Treasurer of the Local, asserted in an affidavit that the suspension of Casumpang's membership in good standing did not deprive him of his rights as a union member. Fujimura's affidavit states. "Casumpang's suspension as a 'member in good standing' only adversely affected his right to continue to serve as a union officer during the period of his suspension . . . . Casumpang remains a dues paying 'member' of the union." Relying on Fujimura's affidavit, the Local maintained before the district court and at oral argument in this appeal that Casumpang cannot come within the zone of interests protected under Title I.

The Local conceded at oral argument before us, however, that as a result of the suspension of Casumpang's membership in good standing, Casumpang can no longer participate in certain aspects of union governance. For example, Casumpang cannot nominate candidates for union office. He cannot vote in union elections. He cannot attend union membership meetings. He cannot participate in deliberations or vote on union business. These are precisely the

rights protected under Title I of the LMRDA. LMRDA §§ 101(a)(1), (2), 29 U.S.C. §§ 411(a)(1), (2). Therefore, we reject the Local's assertion that the suspension of Casumpang's membership in good standing did not strip him of his rights protected under Title I.

The undisputed facts alleged in the second amended complaint demonstrate that Casumpang was within the zone of interests protected by Title I, even though he was an elected business agent. In *Sheet Metal Workers' Int'l Ass'n v. Lynn*, 488 U.S. 347 (1989), the Supreme Court held that the removal by a union trustee of a business agent from his elected office in retaliation for opposing a dues increase at a union meeting violated the free speech provisions of Title I. *See id.* at 350-55. Casumpang alleged in his second amended complaint that he was removed from his status as a union member in good standing in retaliation for his criticism of the Local's leadership. Under *Lynn*, Title I protects Casumpang's right to express his views, even though Casumpang was a business agent when he spoke out.

B. *Impact of Title IV on the District Court's Subject Matter Jurisdiction*

Casumpang asserts that because his claim against the Local under Title I does not seek to set aside the results of the 1998 rerun election, Title IV does not affect the district court's subject matter jurisdiction over his complaint for damages for the suspension of his status as a member in good standing of the Local. The district court concluded that "the substance of Plaintiff's complaint still involves Title IV because it revolves around overturning the Union's decision to suspend him as a member in good standing and effectively means reinstating his eligibility to hold union office."

Under Title IV, "every member [of a labor organization] in good standing shall be eligible to be a candidate" in a union election. LMRDA § 401(e), 29 U.S.C.§ 481(e). A "member

. . . may file a complaint with the Secretary [of Labor] . . . alleging the violation" of his or her right to be a candidate in a union election. LMRDA, § 402(a), 29 U.S.C. § 482(a). Pursuant to Title IV, "[t]he Secretary [of Labor] shall . . . if he finds probable cause to believe that a violation . . . has occurred . . . bring a civil action against the labor organization . . . to set aside the invalid election." LMRDA § 402(b), 29 U.S.C. § 482(b). A complaint filed with the Secretary of Labor is the exclusive means of resolving disputes governed by Title IV. LMRDA § 403, 29 U.S.C.§ 483.

In *Local No. 82, Furniture & Piano Moving v. Crowley*, 467 U.S. 526 (1984), the Supreme Court held that "the exclusivity provision included in § 403 of Title IV plainly bars Title I relief when an individual union member challenges the validity of an election that has already been completed." *Id.* at 541; LMRDA § 403. In footnote 16, however, the Court explained the limited scope of § 403. "This does not necessarily mean that § 403 forecloses the availability of all postelection relief under Title I. The exclusivity provision of Title IV may not bar postelection relief for Title I claims or other actions that do not *directly* challenge the validity of an election already conducted." *Id.* at 541 n.16 (emphasis added).

In *Crowley*, the Court also instructed that:

> Congress adopted the freedom of speech and assembly provision [§ 101(a)(2), 29 U.S.C. § 411(a)(2)] in order to promote union democracy. It recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal. Congress also recognized that this freedom is particularly critical, and deserves vigorous protection, in the context of election campaigns. For it is in elections that members can wield

> their power, and directly express their approval or disapproval of the union leadership.

467 U.S. at 537 (alterations in original) (quoting *United Steelworkers v. Sadlowski*, 457 U.S. 102, 112 (1982) (citations omitted)).

In *Ross v. IBEW*, 513 F.2d 840 (9th Cir. 1975), the plaintiff brought a tort action seeking recovery for damages allegedly inflicted against him by union officials during his campaign for a union position. *Id.* at 841. We concluded that the plaintiff's claim was not preempted by Title IV because the plaintiff did not "challenge [the election] or seek any relief which would interfere with operation of the Local pursuant to the election," and the union did not "claim that the Secretary [of Labor acting pursuant to Title IV could] . . . compensate Ross for the harm he claim[ed] to have suffered." *Id.* at 842-43. We interpreted Congress's intent as follows:

> [T]he considerations apparently prompting Congress to choose the remedy it chose in . . . preventing the blocking or delaying of elections by actions brought by individual members . . . have nothing to do with, and are not frustrated by, the recovery of monetary damages for election-related torts. We perceive no public purpose to be served by prohibiting all civil actions to that end where challenge to the election is not involved and is not the result.

Id. at 843. We held that the operation of Title IV preemption in election-related tort actions turns on two factors: (1) whether the type of relief sought will interfere with the operation of a union pursuant to an already-conducted election, and (2) whether a plaintiff may obtain relief under Title IV for the type of injury he or she claims to have suffered. *See id.* at 842-43.

As interpreted in *Crowley* and *Ross*, the impact of Title IV on a union member's right to seek money damages for a

deprivation of his or her Title I rights balances "Congress['s] clear[ ] inten[t] to lodge exclusive responsibility for post-election suits challenging the validity of a union election with the Secretary of Labor," *Crowley*, 467 U.S. at 544, with Congress's competing desire to "guarantee every union member equal rights to vote and otherwise participate in union decisions, free[ ] from unreasonable restrictions on speech and assembly, and proctect[ed] from improper discipline," *id.* at 536-37. Applying *Ross* and *Crowley* to Casumpang's second amended complaint, we must examine it to determine whether he has directly challenged the validity of the rerun election for Maui Division Director. *Crowley* at 541 n.16; *Ross*, 513 F.2d at 842-43.

In his second amended complaint; Casumpang seeks damages for the Local's alleged violation of his rights under Title I and reinstatement as a member of the Local in good standing. He does not seek reinstatement to the position of Maui Division Director, nor declaratory or injunctive relief related to the validity of the 1998 rerun election. In fact, any claim seeking reinstatement would be moot because the term of office for the candidate elected in the 1998 rerun election for Maui Division Director has expired.[8] Casumpang's Title I claim does not directly challenge the validity of the rerun election for Maui Division Director. The relief he seeks will not interfere with the operation of the Local pursuant to the outcome of the 1998 rerun election.

[8] At oral argument before us, Casumpang's counsel represented that since the initiation of this action the term of office for the position of Maui Division Director expired in the year 2000. A subsequent election was held in that year. The Local did not dispute this representation. *Cf. Ross*, 513 F.2d at 841 (concluding that plaintiff's claims for injunctive and declaratory relief against the running of a union election were rendered moot where the election had already occurred by the time of plaintiff's appeal).

Casumpang could not obtain relief under Title IV for his claim that the Local violated Title I by suspending his membership in good standing in retaliation for his free speech activity. The Local does not argue that the Secretary of Labor can now compensate Casumpang for the harm Casumpang claims he suffered as a result of the Local's alleged violation of Title I. Indeed, the Secretary of Labor has no power to grant relief for violations of Title I. We conclude that Title IV of the LMRDA did not deprive the district court of subject matter jurisdiction over the Title I claim in Casumpang's second amended complaint.

C. *Title I Freedom of Speech Claim*

The district court also concluded that it lacked subject matter jurisdiction over Casumpang's claim because "Plaintiff has failed to demonstrate any evidence of a relationship between the January 17, 1998 determination of the Judicial Panel and the exercise of any Title I rights. . . . Conversely, the Court finds that Defendants have provided more than adequate evidence to corroborate their contention that the decision to discipline Plaintiff was made in accordance with their powers under Title IV of the LMRDA . . . ." Casumpang argues that this conclusion is erroneous.

Section 101(a)(2) of the LMRDA provides, among other things, that "[e]very member of any labor organization shall have the right to . . . express at meetings of the labor organization his views . . . upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of the meetings." To state a cause of action for a violation of § 101(a)(2), a union member must allege facts showing that: (1) he or she exercised the right to oppose union policies; (2) he or she was subjected to retaliatory action; and (3) the retaliatory action was "a direct result of his [or her] decision to express disagreement" with the union's leadership. *Lynn*, 488 U.S. at 354.

Casumpang alleged facts in his second amended complaint showing that he had criticized the Local's leadership at union meetings beginning in 1995 and at the union convention in September 1997. The Local does not contest that its leadership had knowledge of Casumpang's criticisms it at the September 1997 convention. It merely alleges that Casumpang expressed his views as a business agent. But, as noted above, a business agent is protected by Title I from disciplinary action for expressing his views about the conduct of the union's affairs. *Lynn*, 488 U.S. at 350-55. Accordingly, it was not necessary for Casumpang to present evidence that he expressed views critical of the Local leadership in order to establish subject matter jurisdiction.

Within three months following Casumpang's protected activity at the union convention, the Local set aside the November 26, 1997 election won by Casumpang and initiated investigations regarding whether Casumpang had worked as an electrical contractor after being ordered not to do so. Casumpang was found guilty of working as an electrical contractor. As punishment, Casumpang was suspended as a member in good standing for a period of nine years. The suspension was made retroactive to January 14, 1996, thereby barring Casumpang from eligibility for the January 1998 rerun election because candidates for Local office must be members in good standing for a period of two years prior to being nominated. These facts satisfy the first two elements of a cause of action for a violation of LMRDA § 101(a)(2).

The Local argues that Casumpang has failed to demon-strate a causal connection between his criticism of the Local's leadership and the suspension of his status as a member in good standing of the union. In the related field of retaliatory actions by employers under Title VII of the Civil Rights Act of 1964, § 704(a) as amended, 42 U.S.C. § 2000e-3(a), we have held that a causal link between protected activities and an adverse employment action "may be inferred from circum-

stantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). The relationship between a union local and its salaried business agent is closely analogous to the employer-employee relationship under Title VII. As an employee of a union, a business agent is protected from retaliation for his or her free speech activities. Reliance on circumstantial evidence is as necessary to prove a Title I retaliation claim as it is to prove a claim under Title VII. As with discrimination cases, a successful Title I action generally requires a showing of an employer's improper motive and "an employer's true motivations are particularly difficult to ascertain." *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 732 (9th Cir. 1986) (citations omitted). It is quite true that there is no direct evidence in the record that the Local suspended Casumpang's status as a member in good standing in retaliation for his critical comments against the Local's leadership. There is sufficient circumstantial evidence in the record, however, to support an inference that the ostensible basis for the suspension articulated by the Local was a mere pretext to mask its retaliatory intent to punish Casumpang for the expression of his views as a union member.

For example, prior to December 12, 1997, Article II, § 1 of the Local's constitution read as follows:

> Elected and appointed full time officials of the Local, while on the Local payroll, shall not be permitted to hold any other gainful position unless authorized by the Executive Committee with the approval if the Local Executive Board. Any official who is reported to be so engaged shall be suspended from office forthwith pending an investigation of the facts by the trial committee established under Article XXVI.

Article II, § 1 was amended on December 12, 1997, however, to read as follows:

> Elected and appointed full-time officials and *Business Agents* of the Local and Divisions, while on the Union's payroll, shall not be permitted to hold any other gainful position unless authorized by the Executive Committee with the approval of the Local Executive Board. *Gainful position shall not be defined by the profitability of any such venture but rather whether the objective was to earn income or derive some benefit or material gain from said position.* Gainful position shall include any monetary or personal interests in any business or other undertaking in which such interest would be in conflict with the duties of the official or employee, the interest of the Union, or to [sic] the programs and activities of the Local. Any official or business agent who is reported to be so engaged shall be suspended from their position forthwith pending an investigation of the facts by the Judicial Panel established under Article XXVIII or be terminated from employment in cases of at will employees.

(emphasis added).

It is undisputed that this amendment to the Local's constitution was made sixteen days after Casumpang won reelection to the office of Maui Division Director and eleven days after Tacdol filed an appeal from the election results. Eleven days after the amendment, the Local ordered Casumpang to provide information regarding whether he had worked as an electrical contractor after June 4, 1996. The record also shows that on December 29, 1997, Casumpang filed a letter accusing the Local of "an attempt to selectively prosecute me as a result of my election to the office of Division Director." Thus, contrary to the Local's assertion, the record contains evidence that raises a disputed question of fact regarding whether the Local amended its constitution

within three months of Casumpang's criticism of the Local leadership to facilitate the suspension of Casumpang's membership in good standing.

The circumstantial evidence of the temporal proximity between Casumpang's criticism of the leaders of Local 142 and the Local's amendment to its constitution was amply corroborated by other actions taken against Casumpang. For example, shortly after Casumpang made his critical comments at the 1997 convention, the Local invalidated Casumpang's election as a business agent, found Casumpang guilty of engaging in outside employment, suspended his status as a member in good standing; and made the suspension retroactive, thereby precluding him from being nominated for the rerun election for the office of Division Director. Because the district court dismissed this action on jurisdictional grounds, Casumpang did not have the opportunity to seek discovery of facts known to the Local or its agents. We therefore cannot determine from the present record whether the Local's officers made further statements that would suggest Casumpang was punished for the expression of his statutorily protected speech. The district court erred in finding that Casumpang "failed to demonstrate any evidence of a relationship between the January 17, 1998 determination of the Judicial Panel and the exercise of any Title I rights."

The Local counters that factual allegations in a complaint are not sufficient to counter a motion to dismiss. It argues that Casumpang failed to present any evidence to rebut the affidavits offered in support of the motion to dismiss alleging that Casumpang was suspended for engaging in outside employment in violation of the Local's constitution. We reject this contention.

In *Trentacosta v. Frontier Pacific Aircraft Industries, Inc.*, 813 F.2d 1553 (9th Cir. 1987), we held that a nonmoving party must present "evidence outside his pleadings in opposition to a

motion to dismiss for lack of subject matter jurisdiction" whenever "the movant, either in his motion or in any supporting materials, denies or controverts the pleader's allegations of jurisdiction." *Id.* at 1559. Because the plaintiff in *Trentacosta* had failed to "file any affidavit or other evidentiary material in opposition to the defendants' motion to dismiss," we affirmed the district court's dismissal for lack of jurisdiction. *Id.* at 1557. In *Trentacosta*, however, we noted that "there [was] simply nothing" in the record to indicate that subject matter jurisdiction existed. *Id.* Here, the amended and pre-amended versions of the Local's constitu-tion were offered as exhibits at the dismissal proceedings.

The proximity in time between the suspension of Casumpang's membership in good standing and the expression of his views at the union's convention in September, 1997, combined with the December 12, 1997 amendment to the Local's constitution, were sufficient to raise a rebuttable presumption of retaliation. "[W]hen 'ruling on a jurisdictional motion involving factual issues which also go to the merits, the trial court should employ the standard applicable to a motion for summary judgment.' Under this standard, 'the moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.'" *Id.* at 1558 (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983)). Because "material jurisdictional facts" were in dispute, the district court erred in concluding that it lacked subject matter jurisdiction over Casumpang's claim under Title I of the LMRDA.

II

Exhaustion of Union Remedies

After concluding that Casumpang's second amended complaint did not substantially involve Title I rights, the district court stated that even if a Title I claim had been properly pleaded, it "would still dismiss the complaint

because Plaintiff failed to exhaust internal union procedures in a timely fashion." The court stated that "determining whether a union member must *first* exhaust internal union remedies is a matter of judicial discretion." (emphasis added).

Because the district court determined that Title IV governed Casumpang's claim, it appears to have conducted its analysis of the exhaustion issue pursuant to the requirements of Title IV rather than those set forth in Title I. The district court stated that Casumpang's "fail[ure] to exhaust internal union remedies in a timely fashion with regard to [Casumpang's] Title IV claims would also apply to [his] Title I claims." In fact, Titles I and IV of the LMRDA treat exhaustion differently. Title IV *requires* a union member to exhaust internal union remedies before filing a complaint with the Secretary of Labor. LMRDA § 402(a), 29 U.S.C. § 482(a). Title IV provides, in relevant part:

> (a) Filing of complaint; presumption of validity of challenged election
>
> A member of a labor organization—
>
> (1) *who has exhausted the remedies available under the constitution and bylaw of such organization and of any parent body*, or
>
> (2) *who has invoked such available remedies without obtaining a final decision within three calendar months* after their invocation, may file a complaint with the Secretary [of Labor] within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers).
>
> . . .

LMRDA § 402(a)(1),(2); 29 U.S.C. § 482(a)(1),(2) (emphasis added).

By contrast, Title I provides that:

> No labor organization shall limit the right of any member thereof to institute an action in any court . . . . Provided, That any such member *may be required* to exhaust reasonable hearing procedures (*but not to exceed a four-month lapse of time*) within such organization, before instituting legal . . . proceedings against such organization[ ] or any officer thereof . . . .

LMRDA § 101(a)(4), 29 U.S.C. § 411(a)(4) (emphasis added).

The Supreme Court has determined that LMRDA § 101(a)(4) is "a statement of policy that . . . public tribunals . . . may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union." *NLRB v. Indus. Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 426 (1968) ("*Marine Workers*"). LMRDA § 101(a)(4) was "*not intended to limit in any way* the right of a union member . . . to file unfair labor practice charges against a union." *Id.* at 427 (emphasis added) (quoting 105 Cong. Rec. 18152 (1960) (statement of Rep. Griffin)). Under Title I, district courts retain broad discretion to require, or not to require, exhaustion depending on the reasonableness of such requirement in light of the facts of each case. *Id.* at 427-28.

The Supreme Court clarified its view of the exhaustion doctrine in *Clayton v. International Union, United Automobile, Aerospace & Agricultural Implement Workers*, 451 U.S. 679 (1981):

> In exercising this discretion [to exhaust], at least three factors should be relevant [to a district court]: first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the

> employee's grievance or to award him the full relief he seeks . . . ; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim.

Id. at 689.

Although *Clayton* involved an action brought pursuant to the Labor Management Relations Act, its three-factor test also applies to actions brought under the LMRDA. *See Maddalone v. Local 17, United Bhd. of Carpenters & Joiners*, 152 F.3d 178, 186 n.3 (2d Cir. 1998) ("Although the Court in *Clayton* articulated these factors in the context of [a] § 301 claim, they are generally relevant to whether exhaustion should be required under the LMRDA."); *Stevens v. Northwest Ind. Dist. Council*, 20 F.3d 720, 733 n.31 (7th Cir. 1994) ("[G]enerally the *Clayton* considerations are proper guideposts to aid the exercise of exhaustion-excusal discretion under Title I of the LMRDA.").

Where one of the three *Clayton* factors has not been satisfied, internal union remedies are deemed presumptively inadequate and the district court abuses its discretion by requiring exhaustion. *See Clayton*, 451 U.S. at 691, 692 (requiring exhaustion is error where the union can "neither reinstate [the complaining member] in his job, nor reactivate his grievance" because "these restrictions on the relief available . . . render [the internal union] procedures inadequate") (citation omitted)). The burden is on "the moving party . . . [to] establish the availability of adequate internal union remedies." *Scoggins v. Boeing Co.*, 742 F.2d 1225, 1230 (9th Cir. 1984).

In this matter, the district court analyzed only the first factor articulated in *Clayton*. It rejected Casumpang's contention that his pursuit of internal remedies would have been futile merely because Casumpang would have to appeal to the same individuals who suspended him. The Local does not

explain, and the record does not reveal, whether the internal grievance procedures maintained by Local 142 satisfy the two remaining *Clayton* factors. For example, more than two years have passed since Casumpang filed his original complaint in the district court. Assuming Casumpang has missed an internal deadline for filing a grievance with Local 142, nothing in the record demonstrates that the "internal union appeals procedures" maintained by Local 142 will permit Casumpang "to reactivate [his] grievance." *Clayton*, 451 U.S. at 689. Nor is it clear that the internal grievance procedures maintained by Local 142 are capable of awarding Casumpang "the full relief he seeks"; namely, reinstatement as a member in good standing and money damages for the Local's alleged violation of his rights under Title I. *Id.* Finally, it is unclear "whether exhaustion of internal [union grievance] procedures would unreasonably delay [Casumpang's] opportunity to obtain a judicial hearing on the merits of his claim." *Id.* We cannot determine, on the record before us, whether any grievance procedure maintained by Local 142 is likely to be completed within the four month time span provided for in LMRDA § 101(a)(4). We conclude the district court abused its discretion by ordering exhaustion without conducting an analysis under *Clayton*.

CONCLUSION

The district court erred in concluding that it lacked subject matter jurisdiction over the Title I claim set forth in Casumpang's second amended complaint. Contrary to the district court's conclusion, Casumpang did not *directly* challenge the validity of the 1998 rerun election. Instead, he sought a declaration that his Title I rights as a union member had been violated and a restoration of his privileges as a member in good standing, as well as an award of compensatory and punitive damages. Under these circumstances, Title IV does not bar an election-related tort claim filed pursuant to Title I.

The district court also abused its discretion in dismissing this action with prejudice on the alternative ground that Casumpang failed to exhaust internal union remedies *before* filing this action. Upon remand, the district court is instructed to determine whether the internal grievance procedures maintained by Local 142 meet the requirements laid out in *Clayton*. Should the district court determine that the *Clayton* requirements are met, it may dismiss Casumpang's claim without prejudice and require Casumpang to pursue internal union remedies for a period of time not to exceed four months. Should the district court instead determine that the grievance procedures maintained by Local 142 do not satisfy the standards articulated in *Clayton*, it may not compel Casumpang to exhaust union remedies as a prerequisite to entertaining his suit under Title I.

VACATED and REMANDED with instructions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Filed June 24, 1999]

CIV. No. 98-775 ACK

NICANOR E. CASUMPANG, JR.,
Plaintiff,

vs.

INTERNATIONAL LONGSHORE &
WAREHOUSE UNION, LOCAL 142, *et al.*,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS BACKGROUND

On September 23, 1998, Plaintiff Nicanor E. Casumpang, Jr. ("Plaintiff") filed a complaint against Defendant International Longshore & Warehouse Union, Local 142 (the "Union" or the "Local") and Eusebio Lapenia, Jr., President of Local 142 ("Lapenia") (collectively "Defendants"). The case stems from events surrounding the Union's decision to set aside the results of its November 1997 elections for, *inter alia*, the office of Maui division director, which Plaintiff initially won, and the Union's subsequent decision to disqualify Plaintiff from the January 1998 re-run because he was not a member in good standing for a period of two consecutive years prior to nomination. Plaintiff contends that he was disciplined for exercising his right of free speech, in violation of Title I of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411.

The Union elects officers every three years as required by 29 U.S.C. § 481(b). Plaintiff was elected as a full-time

business agent in 1994, which required him to take a leave of absence from his regular job at the Hawaiian Commercial and Sugar Company as a journey worker electrician. Plaintiff began working in his full-time union position on January 2, 1995. On April 2, 1996, Plaintiff was charged with violating Article II, § 1 of the Union constitution (the "constitution") by engaging in work as an electrical contractor while serving as a full-time union official.[1] In proceedings before a union trial committee, Plaintiff stipulated on April 16, 1996 that he was "guilty of violating Article II, Section 1 of the ILWU Local 142 Constitution." Motion to Dismiss, Mar. 2, 1999, Exh. 7, at 4. Plaintiff also agreed to "cease and desist from his activity as an electrical contractor" from April 18, 1996 forward, unless authorized by the Local Executive Committee of the Union. *Id.* at Exh. 7, at 4.

On April 22, 1996, Plaintiff requested authorization to continue working as an electrical contractor, but was denied permission. Commencing on and after May 6, 1996 and continuing to October 13, 1997, Plaintiff engaged in work as an electrical contractor on at least nine separate occasions. Plaintiff maintains that he has not been gainfully employed as an electrician since June 4, 1996 because the "work" was done for friends and he received no compensation or personal benefits. *See* Second Amended Complaint, June 4, 1999, at 8 ¶ 24.

During the November 1997 Union election, Plaintiff was nominated and ran as one of two candidates for the office of

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[1] Article II, § 1 provides:

> Elected and appointed full-time officials of the Local, while on the Local payroll, shall not be permitted to hold any other gainful position unless authorized by the Executive Committee with the approval of the Local Executive Board. Any official who is reported to be so engaged shall be suspended from office forthwith pending an investigation . . . .

Motion to Dismiss, Exh. 2, at 14-15.

Maui division director.[2] The results of the election were announced on November 26, 1997, and Plaintiff was initially declared the winner with an 18-vote margin of victory. However, Plaintiff's opponent, Roger Tacdol, filed an election complaint alleging serious election irregularities relating to the counting of certain challenged ballots. The Election Investigating Committee held a hearing and, on December 11, 1997, recommended that the results of the election be set aside and the election rerun.[3] *See* Motion to Dismiss, Exh. 32, at 14; Exh. 33. The Local Executive Board adopted the Election Investigating Committee's recommendations on December 19, 1997 and ordered that rerun elections be held within forty-five days. *See* Exh. 33, 36, 39, 42. On January 16, 1998, Plaintiff appealed the Local Executive Board's decision to order an election rerun, arguing that the Local Executive Board should have dismissed Tacdol's challenge and affirmed his own challenge. *See id.* at Exh. 43. The President of the International Longshore & Warehouse Union denied this appeal on March 10, 1998. *See id.* at Exh. 45. Plaintiff did not appeal to the International Executive Board. *See id.* at Exh. 60.

Prior to the election rerun, the Local conducted a review process to determine the eligibility of all candidates involved in the election reruns. On December 23, 1997, the Local sent Plaintiff a letter requesting information relating to an investigation into whether Plaintiff had continued to work as

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[2] At the time of his initial nomination and election, no one challenged Plaintiff's eligibility.

[3] The Union's Election Investigating Committee also recommended that the results of the Oahu division business agents race and the Maui division business agents race be set aside due to election irregularities. *See* Motion to Dismiss, Exh. 38, 41. Despite having initially won his election, Plaintiff also filed an election challenge alleging various improprieties but not seeking to overturn the results of the election. *See id.* at Exh. 34. The Election Investigating Committee found Plaintiff's challenge unsupported. *See id.* at Exh. 35.

an electrical contractor while employed as a full-time officer.[4] *See id.* at Exh. 9. Plaintiff objected to the timing of the investigation on December 29, 1997. *See id.* at Exh. 10. On January 5, 1998, Plaintiff and another candidate in the Maui division business agents election were sent notices of possible ineligibility based on preliminary determinations made by Local election officials. *See id.* at Exh. 49, 57. According to the notice, Plaintiff's eligibility was in doubt due to an alleged violation of Article II, § 2.01, which forbids an elected full-time official from holding any other gainful position without authorization. *See id.* at Exh. 49. Evidently, thirteen different witnesses signed a statement of written specific charges against Plaintiff. *See id.* at Exh. 11. On January 7, 1998, the Local Judicial Panel issued a Notice of Charges and of Hearing/Trial set for January 16, 1998.

On January 14, 1998, Plaintiff submitted a letter to Local president Lapenio objecting to the notice of possible ineligibility on three separate grounds. *See id.* at Exh. 50. First, Plaintiff contended that the notice of possible ineligibility, which required that any objections be filed within five days of the date of the notice (*i.e.*, by January 10, 1998), was untimely because he did not even receive the mailed notice until January 10, 1998. Second, Plaintiff argued that the December 1997 amendments to the Local constitution were improper for lack of ratification because the Union failed to properly notify the membership of the subject matter, dates, times, and places of the ratification meetings. Thus, Plaintiff argued, the Judicial Panel which June 13, 1999 was ratified at the 1997 Local constitutional convention was invalid and had no jurisdiction to hear the matter of Plaintiff's disqualification. Plaintiff also argued that the ratification of

[4] Evidently, the Union's investigation of Plaintiff's activities began at least as early as November 4, 1997, when the Maui Division Director submitted a report alleging that Plaintiff was engaged in activities as an electrical contractor. See Motion to Dismiss at Exh. 13, at 6.

Article II, § 1 of the Local constitution was not ratified and must be invalidated.[5] Third, Plaintiff maintained that the amendments to the constitution could not retroactively be applied against him. On January 15, 1998, Plaintiff appealed the 1997 amendments to the Local constitution to the International president, arguing that the amendments were not properly ratified. *See id.* at Exh. 23. On March 11, 1998, the International president issued a written ruling finding no merit to Plaintiff's claims.

On January 16, 1998, the Local Judicial Panel held its hearing and issued a written decision on January 17, 1998. The Judicial Panel determined that Plaintiff "knowingly and deliberately violated Article II, Section 1 of the Constitution" by continuing to work as an electrical contractor while employed as a full-time Union official and unlawfully earned $7,636 as an electrical contractor in 1996. *See id.* at Exh. 13, at 8. The Judicial Panel suspended Plaintiff as a member in good standing for a period of nine consecutive years effective June 14, 1996, revoked his eligibility to be nominated for union office during the nine-year suspension, ordered that he receive no further compensation as a business agent and that he turn over his position, banned him from being appointed to any full-time Local position during that same time period, and required him to pay a fine of $7,636 within sixty days.

On January 20, 1998, the Union issued a letter informing Plaintiff that he was an ineligible candidate because he was "not a member in good standing" for a period of two consecutive years prior to nomination. *Id.* at Exh. 51. On March 19, 1998, the Local Executive Board sustained the determination of the Judicial Panel. *See id.* at Exh. 15. Plaintiff appealed to the International president on April 18, 1998. *See* Opposition at Exh. D. The president of the

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[5] The Court observes that Article II, § 1 appears to have been ratified at least as early as October 2, 1995. *See* Motion to Dismiss at Exh. 2 (cover page).

International union also sustained the determination on July 1, 1998 because Plaintiff had failed to exhaust his remedies at the Local level by appealing to the Local membership. *See* Motion to Dismiss at Exh. 20. In a letter dated August 14, 1998, Plaintiff sought to appeal the International president's ruling to the International Executive Board. *See id.* at Exh. 21. On August 31, 1998, the International president denied Plaintiff's appeal because it was untimely. *See id.* at Exh. 22. On August 25, 1998, Plaintiff wrote a letter to the Local indicating that he wished to appeal the 1997 Local election for Maui division director. *See id.* at Exh. 59. This appeal was denied for failure to exhaust available remedies, including his failure to file a challenge within ten days after the election results were announced (the results were announced on February 10, 1998). *See id.* at Exh. 60. On October 9, 1998, Plaintiff appealed this decision to the Department of Labor, and this appeal was also denied on April 1, 1999 for failure to timely exhaust internal union remedies. *See* Supplemental Affidavit of Guy Fujimura, Apr. 21, 1999, at Exh. 65.

Plaintiff filed the instant case in federal court on September 23, 1998. Defendants filed the instant Motion to Dismiss for lack of subject matter jurisdiction on March 2, 1999, along with a supplemental affidavit on April 21, 1999. On May 26, 1999, Plaintiff filed his Opposition. Defendants filed their Reply on June 7, 1999.

Subsequent to Defendants' Motion to Dismiss, Plaintiff filed a Second Amended Complaint on June 4, 1999. This amended complaint attempts to avoid implicating Title IV of the LMRDA by eliminating references to reinstating Plaintiff in his former position or otherwise overturning the contested election, and provides "additional incidents where Plaintiff expressed his objections to various matters within the Union to support his Title I claims." Opposition, May 26, 1999, at 4. Plaintiff's amended complaint alleges that Defendants'

conduct depriving him of his membership and related privileges constitutes "retaliation for Plaintiff's exercise of his free-speech activity as a union member under 29 U.S.C. Sec. 411. Defendants took such action as part of a purposeful and deliberate attempt to suppress dissent within Local 142." Second Amended Complaint, at 9 ¶ 31.

Specifically, Plaintiff alleges that Defendants retaliated against him because he questioned their decisions on several different occasions, such as their decision to accept a settlement offer, *see id.* at 3 ¶ 8 and their handling of negotiations with various hotels, *see id.* at 4 ¶¶ 9-11, which allegedly resulted in funds set aside for Defendants' desired union health and welfare fund having to be used to fund certain payments to union members, *see id.* at 5 ¶ 15. Plaintiff now seeks a declaratory judgment that Defendants' conduct violated the LMRDA, 29 U.S.C. § 411(a)(1) and (2), that the Court order Defendants to reinstate him as a member of Local 142 with all the privileges accompanying such membership, and that the Court grant Plaintiff compensatory and punitive damages in an amount to be determined at trial.

STANDARD OF REVIEW

"A party invoking the federal court's jurisdiction has the burden of proving the actual existence of subject matter jurisdiction." *See Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). On a Rule 12 (b) (1) motion, the court is not "restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). "The requirement that the nonmoving party present evidence outside his pleadings in opposition to a motion to dismiss for lack of subject matter jurisdiction is the same as that required under Rule 56(e) that the nonmoving party to a motion for summary judgment must set forth specific facts, beyond his

pleadings, to show that a genuine issue of material fact exists." *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F. 2d 1553, 1559 (9th Cir. 1987); *see also Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983) (noting that the district court may receive evidence to resolve underlying factual disputes in a 12 (b)(1) motion to dismiss for lack of subject matter jurisdiction).

The district court's dismissal for lack of subject matter jurisdiction is reviewed de novo. *See Seven Resorts, Inc. v. Cantlen,* 57 F.3d 771, 772 (9th Cir. 1995). Any factual determinations made by the district court in ruling on the motion to dismiss are reviewed for clear error. *See Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994).

DISCUSSION

Defendants argue that the Court lacks subject matter jurisdiction to consider Plaintiff's complaint. Specifically, Defendants contend that although Plaintiff has framed his claim for relief in the language of Title I of the LMRDA,[6] which allows a private suit to be brought to vindicate the denial of free speech, the substance of this dispute concerns Title IV,[7] which provides for complaint to and an action

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[6] Title I of the LMRDA, 29 U.S.C. § 411, provides:

> Every member of any labor organization shall have the right . . . to express any views, arguments, or opinions . . .: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U. S. C.§ 411(a)(2).

[7] Title IV provides as follows:

> In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to

brought by the Secretary of Labor as the exclusive means of resolving election-related complaints. Specifically, Defendants contend that this dispute centers on Plaintiff's "ineligibility as a candidate for union office because he ceased being 'a member in good standing' when it was discovered that he repeatedly violated Article II, Section 1 of the union's Constitution." Motion to Dismiss at 19. Therefore, Defendants reason, the Court lacks subject matter jurisdiction in the instant case. For the following reasons, the Court agrees that the substance of Plaintiff's complaint is governed by Title IV and that the Court lacks jurisdiction to hear this case.

I. TITLE IV, NOT TITLE I, GOVERNS THE SUBSTANCE OF PLAINTIFF'S COMPLAINT.

The Court recognizes that the requirement that one be a "member in good standing" to hold union office, which is at

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> be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) . . . .

29 U.S.C. § 481(e).

> A member of a labor organization—(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body . . . may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title . . . .

Id. at § 482(a)(1).

> The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States . . . to set aside the invalid election . . . .

Id. at § 482(b).

> The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

Id. at § 483.

the heart of Plaintiff's complaint, originates in Title IV of the LMRDA. *See* 29 U.S.C. § 481(e). The LMRDA clearly indicates that Congress intended "to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts." *Calhoon v. Harvey*, 379 U.S. 134, 140 (1965).

Accordingly, the Secretary of Labor has promulgated regulations that permit unions to establish "reasonable qualifications" to be eligible for union office. 29 C.F.R. §§ 452.2, 452.36. Under the applicable rules, a member who engages in misconduct and is disqualified by a union for not being a "member in good standing" may seek appropriate relief from the Secretary of Labor. *See* 29 C.F.R. § 452.50.[8] Courts have consistently ruled that Title IV controls the determination of whether a person is a "member in good standing." *See, e.g.*, *Calhoon v. Harvey*, 379 U.S. 134, 138 (1965) ("Title IV, not Title I, sets standards for eligibility and qualifications of candidates and officials and provides its own separate and different administrative and judicial procedure for challenging those standards."); *United Furniture Workers v. Scarbrough*, 122 L.R.R.M. 2050 (D. Md. 1986) (holding that Title IV governed whether plaintiff, who won the union election but was subsequently disqualified, was a member in good standing based on non-payment of dues under extenuating circumstances); *Kirrane v. Transport Workers Union*, 781 F.

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[8] 29 C.F.R. § 452.50 provides:

> Section 401(e) was not intended to limit the right of a labor organization to take disciplinary action against members guilty of misconduct. . . . However, if a union has improperly disciplined a member and barred him from candidacy, the Secretary may, in an appropriate case, treat him as a member in good standing entitled to all the rights of members guaranteed by Title IV.

29 C.F.R. § 452.50.

Supp. 1044, 1051 (S.D.N.Y. 1992) (holding that Title IV governed a declaratory judgment that plaintiff was a member in good standing). In the instant case, Plaintiff has not challenged the reasonableness of the qualifications to hold union office, nor has he alleged that the qualifications have been applied to him in a discriminatory fashion.

Despite Plaintiff's amendments to his complaint and his assertions of Title I violations, the Court finds that Title IV governs the instant case. Although Plaintiff no longer wishes to overturn the results of the 1997 rerun election, a course that would certainly run afoul of Title IV, the Court finds that the substance of Plaintiff's complaint still involves Title IV because it revolves around overturning the Union's decision to suspend him as a member of good standing and effectively means reinstating his eligibility to hold union office. This relief—having the Court reinstate him as a member in good standing—would implicitly impact the 1998 rerun election results because it would be akin to having the Court declare that Plaintiff was improperly barred from running in that election, which determination is the exclusive province of the Secretary of Labor. *See* 29 U.S.C. § 483.

Title I safeguards the rights of union members to nominate candidates, vote in elections, and attend and participate in the deliberations and voting at membership meetings. *See* 29 U.S.C. § 411(a)(1). "The right to hold office is not among the rights guaranteed by 29 U.S.C. § 411." *United States v. International Bhd. of Teamsters*, 988 F.Supp. 759, 766 (S.D.N.Y. 1997) (holding that disqualification of candidate based on his knowledge of campaign irregularities and subsequent rerun of election without said candidate did not constitute "discipline" within the meaning of Title I). Moreover, "the privilege of being a candidate for elective union office is not among the membership rights protected" by Title I. *Id.*

There is only one narrow exception to the broad mandate of *Calhoon* that Title IV governs eligibility questions. *See Driscoll v. International Union of Operating Eng'r, Local 139*, 484 F.2d 682, 686 (7th Cir. 1973); *see also Kupau v. Yamamoto*, 622 F.2d 449, 454 (9th Cir. 1980) ("[W]here the allegation is that the eligibility rules have been applied discriminatorily, . . . then a Title I action is presented."); *Department of Labor v. Aluminum, Brick, and Glass Workers Int' l Union Local 200*, 941 F.2d 1172, 1180 (11th Cir. 1991) ("The even-handed application of a reasonable union rule is not arbitrary action by a union or its officers. It would be arbitrary, however, to use a union rule in bad faith in order to punish a member; this would constitute "discipline" within the meaning of the Act." (quoting *Macaulay v. Boston Typographical Union No. 13*, 692 F.2d 201, 204 (1st Cir. 1982))). This exception involves claims in which the plaintiff challenges a union's disciplinary decision that has had the effect of rendering him ineligible to run for elected union office and the "thrust of the complaint" is that the disciplinary sanction was "part of a purposeful and deliberate attempt by union officials to suppress dissent within the union." *Driscoll*, 484 F.2d at 687.

However, the Court recognizes that this exception is narrow and Title I jurisdiction under the LMRDA cannot be obtained "by the mere assertion of the denial of Title I rights if Title IV rights are essentially involved." *McNail v. Amalgamated Meat Cutter*, 549 F.2d 538, 540 (8th Cir. 1977) (dismissing plaintiff's purported Title I claim for lack of subject matter jurisdiction; election committee's ruling that plaintiff was ineligible because she was not working in a bargaining unit as required by the union involved Title IV); *see also Calhoon v. Harvey*, 379 U.S. 134, 138 (1965) (holding that disputes relating to eligibility of candidates for union office fall squarely within Title IV). Rather, the existence of jurisdiction depends on "a close analysis of the

basic thrust of the complaint," not mere acceptance of the allegations of Title I violations. *Driscoll*, 484 F.2d at 687. As the Ninth Circuit has explained:

> We believe that the better view of the relationship between Title I and Title IV remedies is that . . . the crucial inquiry is whether a union member has been discriminated against in the exercise of his Title I rights. If so, then regardless of other claims his Title I cause of action is not preempted by the existence of Title IV claims.

Kupau v. Yamamoto, 622 F.2d 449, 455 (9th Cir. 1980) (internal quotation marks omitted); *see also United Furniture Workers v. Scarbrough*, 122 L.R.R.M. 2050 (D. Md. 1986) ("*Crowley* does not bar the Court from addressing . . . Title I allegations altogether, but any relief afforded by the Court is required to be 'appropriate' in the narrowest sense. *Crowley* does bar a Court from interfering with the responsibilities of [the Department of Labor] under Title IV, however, and in the course of the interplay between those two Titles, Title IV concerns have the upper hand." (citing *Local No. 82 v. Crowley*, 467 U.S. 526 (1984))). If mere allegations were sufficient, then plaintiffs could easily evade Title IV's exclusivity provisions by suddenly raising Title I claims before the district court.

In the instant case, the Court finds that Plaintiff has failed to demonstrate any evidence of a relationship between the January 17, 1998 determination of the Judicial Panel and the exercise of any Title I rights. In fact, the Court notes that the first time Plaintiff raised these alleged Title I violations was in his amended complaint in response to Defendants' admittedly meritorious motion to dismiss. Plaintiff did not raise his Title I claims before the Union or the Secretary of Labor at any point. This failure to raise these claims earlier,

coupled with Plaintiff's failure to file an affidavit in support of his amended complaint, severely undermines Plaintiff's allegations of Title I violations.

Conversely, the Court finds that Defendants have provided more than adequate evidence to corroborate their contention that the decision to discipline Plaintiff was made in accordance with their powers under Title IV of the LMRDA and was not made to suppress dissent within the Union. As detailed above in the Court's factual summary, Plaintiff was disciplined because he was found guilty of working as an electrical contractor while serving as a business agent, a violation of the Union constitution that required that he be "suspended from office forthwith." Motion to Dismiss, Exh. 2 at 15. Thus, in the absence of some evidence that the Union has applied its membership requirements against Plaintiff in a discriminatory fashion, the Court finds that Plaintiff has not been disciplined within the meaning of Title I. Moreover, the Court observes that the relief Plaintiff seeks—having the Court reinstate him as a member in good standing—would implicitly impact the 1998 rerun election results because it would be akin to having the Court declare that Plaintiff was improperly barred from running in the election.

Plaintiff's reliance on *Grand Lodge v. King*, 335 F.2d 340, 343 (1964), *overruled in part by Finnegan v. Leu*, 456 U.S. 431 (1982), and *Rollison v. Hotel, Motel, Restaurant, Etc.*, 677 F.2d 741, 745 (1982), is misplaced. Both cases are inapposite because the union member was disciplined specifically for engaging in protected speech and conduct. *See Grand Lodge*, 335 F.2d at 343-44 (affirming district court's refusal to grant motion to dismiss where plaintiffs alleged, and the union conceded, that they were discharged as union officers because they supported an unsuccessful candidate in a union election); *Rollison*, 677 F.2d at 745 (union charged plaintiff with, *inter alia*, holding unauthorized meetings and disseminating derogatory stories concerning

union officials; court held that plaintiff's free speech claims dominated and any "overlap" with Title IV was "more coincidence than anything else"). As *Bradley v. American Postal Workers Union*, 962 F.2d 800 (8th Cir. 1992), makes clear, the use of constitutionally established procedures that ultimately resulted in Plaintiff's suspension as a "member in a good standing" does not give rise to a free speech claim based on a theory of retaliation under Title I. *See Bradley*, 962 F. 2d at 802-03 (holding that the use of a normal appeals process that plaintiff claimed thwarted his challenge and was retaliatory did not deprive him of his Title I rights).

II. PLAINTIFF FAILED TO EXHAUST INTERNAL UNION REMEDIES IN A TIMELY FASHION.

Even if the Court found that Plaintiff's Second Amended Complaint substantively involved Title I rights rather than Title IV rights, which it does not, the Court would still dismiss the complaint because Plaintiff failed to exhaust internal union procedures in a timely fashion. Plaintiff correctly points out that determining whether a union member must first exhaust internal union remedies is a matter of judicial discretion. *See Cooke v. Orange Belt Dist. Council*, 529 F. 2d 815, 820 (9th Cir. 1976) ("[T]he trial court may choose not to require exhaustion of internal remedies when to do so would be futile or when the available remedy is inadequate."); *Maddalone v. Local 17, United Brotherhood of Carpenters and Joiners*, 152 F.3d 178, 186 (2nd Cir. 1998).

Title IV requires a union member to exhaust "the remedies available under the constitution and bylaws of such organization and of any parent body . . . ." 29 U.S.C. § 482(a). In the instant case, the Department of Labor's Statement of Reasons For Dismissing the Complaint ("Statement of Reasons") rests exclusively on Plaintiff's failure to exhaust internal remedies as required by 29 U.S.C. § 482. With regard to the November 26, 1997 election, the Statement of Reasons explains that Plaintiff filed his

complaint with the Department of Labor on October 9, 1998, more than four months after his December 5, 1997 invocation of internal remedies. *See* Supplemental Affidavit of Guy Fujimura, Exh. 65, at 2. Furthermore, he never received a final decision from the International Executive Board based on his December 5, 1997 complaint because he did not appeal the International president's March 10, 1998 decision within thirty days. *See id.* With regard to the January 30, 1998 re-run election, the Statement of Reasons also concludes that Plaintiff "failed to exhaust available internal union remedies and did not obtain a final decision from the union . . . ." *Id.* Therefore, the Secretary of Labor's decision not to bring an action based on Plaintiff's protests is exclusive and prevents this Court from assuming jurisdiction. *See* 29 U.S.C. § 483(e); *Bradley v. American Postal Workers Union*, 962 F.2d 800, 803 (8th Cir. 1992).

The Court notes that Plaintiff, prior to filing his Second Amended Complaint, has never explicitly claimed that the Judicial Panel's January 17, 1998 determination that he was no longer a "member in good standing" was due to his criticisms, objections, and disagreements with other Union officers. *See* Second Supplemental Affidavit of Guy Fujimura, June 7, 1999, at ¶ 6; *see also* Motion to Dismiss, Exh. 10, 14, 16, 21, 24, 50, 54, 59. Nevertheless, Plaintiff contends that he exhausted internal union remedies by appealing to the Local Executive Board on January 23, 1998 and the International President, despite the fact that nowhere do these appeals claim any violation of Plaintiff's free speech rights under Title I. Plaintiff also contends that pursuing internal remedies any further would have been futile.

The Court disagrees with Plaintiff's argument and finds that, in the exercise of judicial discretion, the failure to utilize available internal remedies to protest the alleged violations of Title I is an alternative reason justifying

dismissal.[9] *See National Labor Relations Board v. Marine Workers*, 391 U.S. 418, 429 (1968) ("Finally, it is appropriate to emphasize that courts and agencies will frustrate an important purpose of the 1959 legislation if they do not, in fact, regularly compel union members 'to exhaust reasonable hearing procedures' within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function.") (Harlan, J. concurring). An unpublished district court decision succinctly summarizes the rationale for requiring exhaustion.

> Without an exhaustion requirement, the jurisdictional distinction between Title I and Title IV claims would be eliminated every time a political dispute arose or an elected official's action was interpreted as stifling dissent. The exhaustion requirement exists to ensure that allegations of purposefully suppressed dissent are well-founded and have not been advanced simply to create jurisdiction under Title I by artfully sidestepping the requirements of Title IV. To that end, the Union's appeal process effectively separates the substantive claims of purposeful suppression from those that are merely conclusory.

Colgan v. Carey, 1995 WL 88974, at *7 (N.D. Ill. 1995).

Even if the Court construed Plaintiff's Title IV appeal to the Secretary of Labor as also involving Title I,[10] the Secretary of Labor's determination that Plaintiff failed to

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[9] 29 U.S.C. § 411(a)(4) provides that "any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings . . . ."

[10] In its Statement of Reasons, the Department of Labor expressly stated that it did not consider the issue of whether Plaintiff's rights under Title I were violated by the suspension. *See* Supplemental Affidavit of Guy Fujimura, Exh. 65, at 2 n.l.

exhaust internal union remedies in a timely fashion with regard to Plaintiff's Title IV claims would also apply to Plaintiff's Title I claims.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUN 24 1999

/s/ [Illegible]
United States District Judge

CASUMPANG V. INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 142, ET AL.; CIV. NO. 98-775, ACK; ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Dec. 5, 2001]

No. 99-16674
D.C. No. CV-98-00775-ACK

NICANOR E. CASUMPANG, JR.,
Plaintiff-Appellant,

v.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142,
Defendant,

and

JOHN DOES 1-10; INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 142; EUSEBIO LAPENIA, JR.
Defendants-Appellees.

ORDER

Before: ALARCÓN, KOZINSKI, and HAWKINS, *Circuit Judges.*

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kozinski and Hawkins have voted to reject the petition for rehearing *en banc*. Judge Alarcón would so recommend.

The full court has been advised of the petition for an *en banc* hearing, and no judge of the court has requested a vote on the petition for rehearing *en banc*. Fed.R.App.P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing *en banc* is REJECTED.